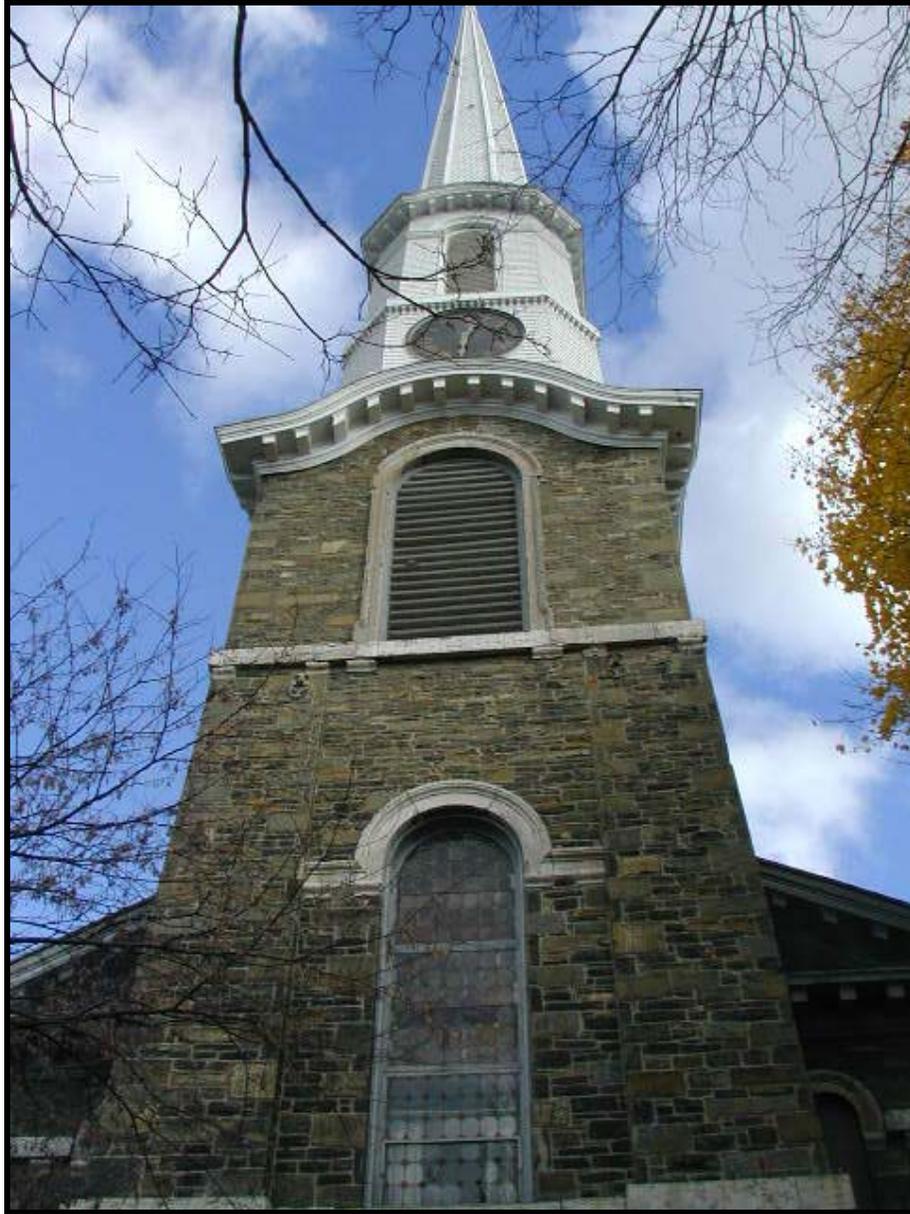




# The Local Landmarker

## Issue 13, Fall 2009

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*On the Cover: The Old Dutch Church of Kingston New York. This outstanding example of the ecclesiastical work of 19<sup>th</sup> century architect Minard LaFever was completed in 1852; It is the third church building for the congregation, which was organized in 1659. Constructed out of local bluestone laid in a random ashlar, the gracefully stepped tower is a highly visible feature of Kingston's historic Stockade District. Kingston has been a CLG since 1986.*

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## *From the Coordinator*

### **SEQRA – A Point of Confusion**

The Fall *Local Landmarker* covers a state law that has been the subject of much discussion both among fellow commissioner members on the CLG Listserv (have you joined yet?) and staff here at the State Historic Preservation Office.

The State Environmental Quality Review Act, was adopted in 1976, and last amended in 2000. It is an “Environmental Conservation Law”, and as such is overseen by the New York State Department of Environmental Conservation (NYSDEC). It applies to “All State and Local Agencies Within New York State Including All Political Subdivisions, Districts, Departments, Authorities, Boards, Commissions and Public Benefit Corporations” (DEC, Regulations, Chapter IV, General Regulations, Section 617). However, key to using the law is first understanding how your “District, Department, etc.” fits within the regulations, and what your responsibilities are in regard to the regulations. After discussing this colleagues and Commission members and getting varying answers from just about everyone, I decided to ask for legal assistance! I turned to Kathleen Martens, Associate Counsel in the Counsel’s Office of our agency, who helps us with many other issues in regard to historic preservation and the law, and who knows SEQRA much better than I do. She kindly stepped up and provided the article featured in the issue of the *Landmarker*. She was assisted in research and writing by Samantha David, a law intern working in her office. This article is intended to be Part 1 of several more SEQRA focused articles that she will provide. I’m certain you will have questions and comments once you look over this article; if you do, please let me know, and I’ll ask her to address them in upcoming issues, or perhaps a SEQRA question and answer section in the Winter *Landmarker*.

As always, I hope that the *Landmarker* will continue to address questions affecting all local preservation Commissions and Boards, and foster dialogue and community among CLGs. And, as always, I look for your feedback and suggestions for future articles.



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## *The State Environmental Quality Review Act (SEQRA) and Local Historic Preservation Review*

**Kathleen L. Martens, Associate Counsel,  
New York State Office of Parks, Recreation, and Historic Preservation**

### **Part 1 – Certificate of Appropriateness/Historic Preservation Permit**

A city, town or incorporated village (municipality) may create a historic preservation board or commission (commission) in local law or regulation, and authorize it to perform certain duties, including those outlined in the General Municipal Law.<sup>1</sup> If the municipality decides to participate in the State Historic Preservation Office’s federally-sponsored Certified Local Government (CLG) program, then the local law must comply with those requirements as well.<sup>2</sup>

One of the commission’s paramount duties is to approve or disapprove (with or without conditions) an application to demolish, relocate, or alter a designated historic property or an application for new construction in or adjacent to a designated historic district or adjacent to a designated property.<sup>3</sup> The commission’s vehicle for reviewing and deciding the application is the Certificate of Appropriateness or Historic Preservation Permit (certificate).<sup>4</sup>

The State Environmental Quality Review (SEQR) process requires a local agency<sup>5</sup> to assess whether the activity it undertakes, funds, approves, plans, regulates or legislates could significantly and adversely affect the environment.<sup>6</sup> If the answer is yes, then an Environmental Impact Statement (EIS) must be prepared to analyze the identified adverse effects.

However, in general, the historic preservation commission’s certificate is not subject to SEQR.<sup>7</sup> It is often difficult for the public to comprehend the reason behind this rule. At first glance, it looks like the commission is an “involved agency;”<sup>8</sup> the certificate’s approval appears

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<sup>1</sup> See, N.Y. GEN. MUN. LAW § § 96-a and 119-dd (McKinney 2007).

<sup>2</sup> See, New York State Office of Parks, Recreation and Historic Preservation, <http://www.nysparks.state.ny.us/shpo/certified-local-governments> (last visited Sept. 24, 2009).

<sup>3</sup> See, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, CERTIFIED LOCAL GOVERNMENT (CLG) PROGRAM IN NEW YORK STATE: MODEL HISTORIC PRESERVATION LAW FOR MUNICIPALITIES IN NEW YORK STATE § 2(D)(x), available at <http://www.nysparks.state.ny.us/shpo/certified-local-governments> (last visited Sept. 24, 2009).

<sup>4</sup> See, *id.* at § § 4 through 10.

<sup>5</sup> See, N.Y. COMP. CODES R. & REGS. (NYCRR) tit, 6, § 617.2(v) (2000), *broadly defining* “Local Agency” as “...any local agency, board, authority, district, commission or governing body, including any city, county and other political subdivision of the state.”

<sup>6</sup> 6 NYCRR § 617.7(a) (1995).

<sup>7</sup> See, *Inc. Vil. of Atl. Beach v. Gavalas*, 81 N.Y.2d 322, 615 N.E.2d 608, 599 N.Y.S.2d 218 (N.Y. 1993), *followed in Matter of 67 Vestry Tenants Ass’n v. Raab*, 172 Misc.2d 214, 658 N.Y.S.2d 804 (N.Y. Sup. Ct. 1997), *also followed in Citineighbors Coal. of Historic Carnegie Hill v. NYC Landmarks Pres. Comm’n*, 306 A.D.2d 113, 762 N.Y.S.2d 59 (1<sup>st</sup> Dept. 2003).

<sup>8</sup> 6 NYCRR § 617.2(s) (2000), *defining* Involved Agency as “an agency that has jurisdiction to fund, approve, or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an ‘involved agency’ notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced. The lead agency is also an ‘involved agency.’”



to be an “action;”<sup>9</sup> and the proposed alteration affects the “environment”<sup>10</sup> as defined in SEQR. However, in making its decision on the certificate, the commission is operating in this instance under narrow jurisdictional criteria, and applying specific standards outlined in the municipality’s law or regulation that are derived from the *Secretary of the Interior’s Standards for Treatment of Historic Properties (1995)*.<sup>11</sup> Under the controlling SEQR statute, regulations and court decisions, therefore, the decision on the certificate is considered ministerial or non-discretionary and exempt from SEQR.<sup>12</sup>

“[O]fficial acts of a ministerial nature, involving no exercise of discretion. . . .”<sup>13</sup> are not “actions” subject to environmental review. Furthermore, the SEQR regulatory Type II list specifically cites as examples of exempt activities: “building permits and historic preservation permits where issuance is predicated solely on the applicant’s compliance or noncompliance with the relevant local building or preservation code(s).”<sup>14</sup>

And, in determining if a challenged decision is ministerial and non-discretionary (whether it is a building permit, demolition permit or the historic preservation certificate we are discussing here) the courts look at the text of the local law or regulation that provides jurisdictional authority. For an action to be ministerial there must be “no latitude of choice.”<sup>15</sup> So, if the commission lacks discretionary authority to consider the other voluminous environmental information in an EIS in making its decision, then SEQR does not apply.<sup>16</sup> The Court of Appeals, in *Incorporated Village of Atlantic Beach*, further held that even “when an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered ‘actions’ . . .” under SEQR.<sup>17</sup>

Cases involving challenges to the New York City Landmarks Preservation Commission (LPC) decisions illustrate how the courts construe this SEQR exemption. *Matter of 67 Vestry Tenants Assoc. v. Raab*, involved a building permit and a certificate for renovation of a historic warehouse located in the Tribeca North Historic District coupled with other new construction. The court there followed the test laid out by the Court of Appeals in *Incorporated Village of Atlantic Beach* in reviewing the ministerial nature of the building permit and the LPC certificate.<sup>18</sup> Additionally, in *Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Commission* the court found the LPC’s decision on its certificate to be

<sup>9</sup> 6 NYCRR § 617.2(b)(1)(iii) (2000) (“environment” includes a resource of “historic or aesthetic significance”).

<sup>10</sup> 6 NYCRR § 617.2(l) (2000).

<sup>11</sup> Available at [www.cr.nps.gov/local-law/arch\\_stnds\\_0.htm](http://www.cr.nps.gov/local-law/arch_stnds_0.htm) (last visited Sept. 28, 2009); See, also

6 NYCRR § 617.5(c)(2) “replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site” is not subject to SEQR.

<sup>12</sup> Also, the decision on a subsequent hardship application after disapproval of the certificate generally would be exempt from SEQR under 6 NYCRR § 617.5(19) as ministerial or would not be subject to SEQR under 6 NYCRR § 617.5(31) as an interpretation of the local law or regulation.

<sup>13</sup> N.Y. ENVTL. CONSERV. LAW § 8-0105 (5)(iii) (McKinney’s 2005).

<sup>14</sup> 6 NYCRR § 617.5(c)(19) (1995).

<sup>15</sup> *Inc. Vil. of Atl. Beach*, 81 N.Y.2d at 325, 615 N.E.2d at 609, 599 N.Y.S.2d at 219, citing *Matter of Filmways Communications v. Douglas*, 106 A.D.2d 185, 484 N.Y.S.2d 738, *affd.* 65 N.Y.2d 878, 493 N.Y.S.2d 309, 382 N.E.2d 1225 (N.Y. 1985).

<sup>16</sup> See, *Inc. Vil. of Atl. Beach*, 81 N.Y.2d at 326, citing *Filmways*, 106 A.D.2d at 187 followed in *Matter of 67 Vestry Tenants Ass’n*, 172 Misc.2d at 223, 658 N.Y.S.2d at 810.

<sup>17</sup> *Inc. Vil. of Atl. Beach*, 81 N.Y.2d at 326, 615 N.E.2d at 610, 599 N.Y.S.2d at 220.

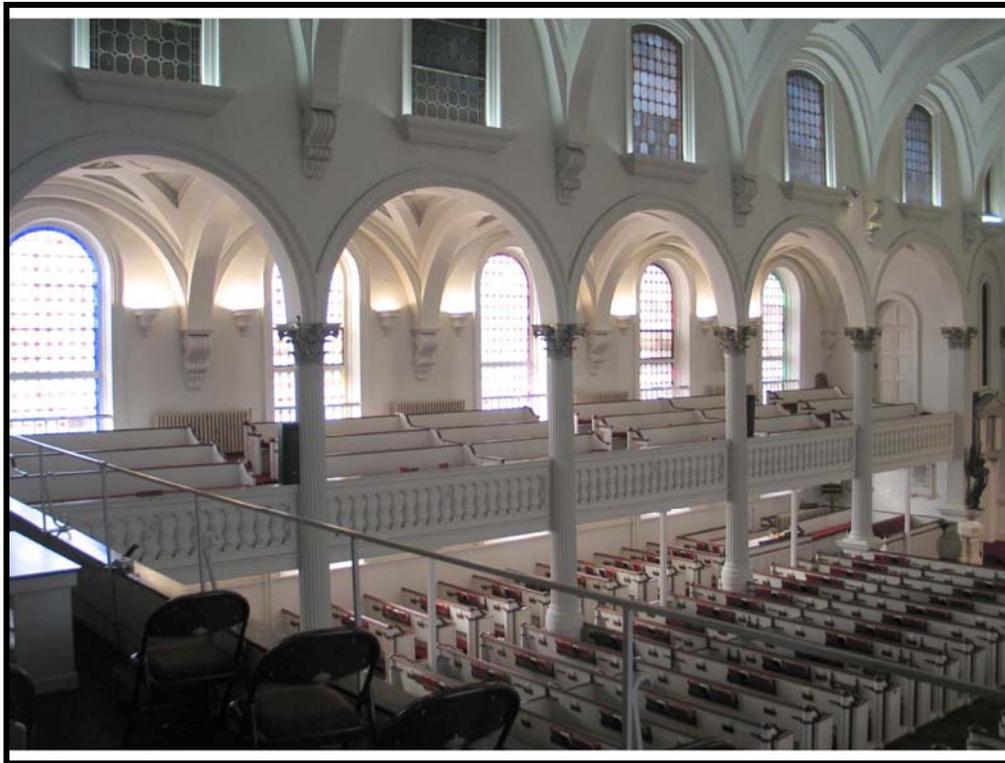
<sup>18</sup> *Matter of 67 Vestry Tenants Ass’n*, 172 Misc.2d at 223, 658 N.Y.S.2d at 810.



“narrowly circumscribed by the architectural, esthetic, historical and other criteria specifically set forth in the Landmarks Law.”<sup>19</sup>

In conclusion, when the commission’s only responsibility with respect to a pending project involves the certificate, then that decision is exempt from SEQR. Other State or local agencies with different jurisdictions may, however, be reviewing the same project. For their purposes the project could be considered an “action” under SEQR. And, their assessment and analysis of environmental impacts could occur at the same time as or before or after the commission’s decision on the certificate. Although the commission could be interested in their SEQR review, it could not formally engage in the process as an “involved” agency.<sup>20</sup>

To streamline its commission’s review of applications to alter designated historic properties, therefore, a city, town or village should ensure its local law and regulation are properly crafted to ensure the decision on the certificate qualifies for this SEQR ministerial exemption.



***Inset: the interior of the Old Dutch Church in Kingston.*** The interior design of the Old Dutch Church borrows heavily from Christopher Wren’s St. Paul’s in London and the New Church at Delft, Holland, with its ribbed vaulted ceiling, simulated clerestory windows and Corinthian columns.

<sup>19</sup> *Citineighbors Coal.*, 306 A.D.2d 113, 114, 762 N.Y.S.2d 59, 60 (1<sup>st</sup> Dept. 2003), *appeal dismissed* 2 N.Y.3d 727, 811 N.E.2d 2, 778 N.Y.S.2d 740 (N.Y. 2004).

<sup>20</sup> 6 NYCRR § 617.2(s) (2000).



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## *Featured Website*

The National Trust for Historic Preservation has produced a new website focusing on the appropriate weatherization of historic buildings. With Winter coming, and fuel costs not exactly falling, It pays as a member of a preservation Commission to have the right facts about weatherizing older building at hand. This site provides exactly that! As the National Trust site explains:

*“Not since the days of the oil crisis in the 1970’s have Americans been so focused on energy consumption, especially weatherization. Just as the cost of heating and cooling has risen, so has the awareness of just how much energy seeps out of an average home every day. Central to this discussion is the role of older and historic buildings – and making them more energy efficient without jeopardizing their unique character”*

The site can be accessed at:

<http://www.preservationnation.org/issues/weatherization/>



## The Back Page

### Important Changes to the New York State Tax Credit for the Rehabilitation of Historic Buildings!

For several years the Preservation League of New York State (the statewide preservation advocacy non-profit – Check them out at [www.preservenys.org](http://www.preservenys.org)) worked to expand and improve the existing New York State Rehabilitation Tax Credit programs. The credits as originally passed were a good start, but the language of the bill limited use of the residential credits to a very small group of buildings, and limited the size of the commercial rehab credit to a fairly modest size given other state's similar credits. Due to the hard work of the League, and that of committed citizens, local municipal officials, preservation-minded developers, and others, Governor Patterson signed new, greatly improved tax credits into law on July 29, 2009.

We expect that the changes will spur new interest in the reinvestment into existing historic commercial areas, and most importantly, historic residential neighborhoods. Therefore, as a local advocate for historic preservation, your Commission or Board should have as much information as possible on the credits. If you wish to know more about them, you can call the main SHPO phone number (518) 237-8643, and ask to be connected to the appropriate SHPO representative for your location. The new credits won't be in effect until January 1, 2010, but we've already seen an uptick in calls and emails about them, so it would behoove you to be up on them!



*The Kirkland Hotel in Kingston's historic Stockade District is an excellent example of an adaptive reuse. Built as boarding house in a half-timbered Tudor-Revival style in 1899, it was converted to a hotel in 1922 with the addition of a restaurant. Run as a popular family-run hotel and dining establishment, it held a place in the social life of Kingston until the 1970s. By 1996, it was vacant and threatened with demolition for a parking garage. The Rural Ulster Preservation Company (RUPCO) acquired it in 2002, placed the building on the National Register of Historic Places, and completed rehabilitation into office, housing, and rental space, using federal historic preservation tax credits. Work items included restoring the bell-cast dome roof over the cupola and the porch (both seen here) that had been removed in the 1970's. RUPCO is a not-for-profit agency, established in 1981 to foster housing and community development in Ulster County. The project received an Historic Preservation Award from SHPO last December. You can read more about the project at [www.rupco.org/test/kirklandhistory.html](http://www.rupco.org/test/kirklandhistory.html)*

